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October 10, 2019

VIA CM/ECF

Lyle W. Cayce
Clerk of the Court
U.S. Court of Appeals for the Fifth Circuit
F. Edward Herbert Building
600 S. Maestri Place
New Orleans, LA 70130

Re: *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, et al., No. 18-60302

Dear Mr. Cayce:

Pursuant to the Court's September 10, 2019 order, Appellants All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael E. Gray (collectively, "All American") submit this letter brief addressing "[w]hat action this court should take in light of" *Collins v. Mnuchin*. Since *Collins* was decided, the Consumer Financial Protection Bureau ("CFPB") has conceded that it is unconstitutionally structured, and *Collins* strongly reinforces that conclusion. The Court should so hold and, consequently, at minimum reverse the district court's denial of All American's motion for judgment. All American respectfully requests that the Court act as expeditiously as possible.[1]

The CFPB is an aberration in our constitutional system, and its structure threatens the individual liberty safeguarded by the separation of powers. This constitutional violation—one that has turned Mr. Gray's life upside down—demands meaningful redress. "The very essence of civil liberty … consists in the right of every individual to claim the protection of the laws, whenever he

[1] All American hereby notifies the Court that All American has filed a petition for a writ of certiorari before judgment in this case. *See All Am. Check Cashing, Inc. v. CFPB*, No. 19-432 (Sept. 30, 2019) (U.S.).

receives an injury," and "where there is a legal right, there is also a legal remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)).

## I. The CFPB Is Unconstitutionally Structured.

The CFPB now agrees with All American (and the United States) that the CFPB's structure violates the Constitution. Moreover, the Court's en banc decision in *Collins v. Mnuchin*, --- F.3d ---, No. 17-20364, 2019 WL 4233612 (5th Cir. Sept. 6, 2019), underscores that All American, the CFPB, and the United States are all correct: The CFPB is unconstitutional.

### A. The CFPB Now Concedes It Is Unconstitutionally Structured.

The CFPB Director has informed Congress that the agency "has determined that the for-cause removal provision" of the Consumer Financial Protection Act ("CFPA") is "unconstitutional." *See* Letter from Kathleen L. Kraninger, Director, CFPB to Hon. Nancy Pelosi, Speaker of the U.S. House of Representatives at 1 (Sept. 17, 2019) ("Kraninger Letter"). The CFPB has also taken this position in a petition pending before the U.S. Supreme Court. *See* U.S. Br. 20, *Seila Law, LLC v. CFPB*, No. 19-7 (U.S.). Consistent with those positions, the CFPB has informed this Court that the agency will no longer defend its constitutionality in this case. Doc. 00515121970 (Sept. 18, 2019).

While this concession ends the merits dispute between the parties, it comes tragically late in the day. Mr. Gray, who has already lost his banking license and paid a large penalty in the related state proceeding, has been deeply harmed in being prosecuted for the last three and a half years by an agency that "lack[ed] authority to bring this enforcement action" in the first place "because its composition violates the Constitution's separation of powers." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). Despite the fact that "the Department of Justice[] determined in March 2017 that the for-cause removal provision of the CFPA unduly interferes with the President's Executive authority under Article II," the CFPB opposed All American's position for *years* before coming around to the decision "that the Bureau should adopt the Department of Justice's view that the for-cause removal provision is

unconstitutional." Kraninger Letter at 2. That is the right outcome, but a day late and a dollar short for All American.

**B. *Collins* Highlights The CFPB's Constitutional Deficiencies.**

*Collins v. Mnuchin* strongly supports the conclusion that the CFPB is unconstitutionally structured. The en banc Court acknowledged an "iron truth": "Congress, when creating agencies, is itself constrained—at all times—by the separation of powers." 2019 WL 4233612, at *1. But Congress has flouted those fundamental boundaries in the CFPA. Just as the "for-cause removal protection" of the Housing and Economic Recovery Act of 2008 ("HERA") "infringes Article II," and "does not fit within the recognized exception for independent agencies … established in *Humphrey's Executor*," *id.* at *22, so, too, the CFPA's for-cause removal provision violates Article II. It "is a new innovation and falls outside" the limited exceptions acknowledged by the Supreme Court. *Id.* at *25. "Granting both removal protection and full agency leadership to a single FHFA Director stretches the independent-agency pattern beyond what the Constitution allows." *Id.* The CFPB possesses those two basic features, just like the FHFA.

The en banc decision also "reinstate[d]" the portion of the panel opinion "which holds that [the] FHFA's structure is unconstitutional." 2019 WL 4233612, at *22. As All American detailed at length in its Reply Brief, application of the factors addressed in *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018) ("*Collins Panel Op.*"), to the CFPB requires striking down the agency as unconstitutional because there is no constitutionally significant difference between the two agencies. *See* Reply Br. 6-15 (applying each of the factors considered in *Collins* to the CFPB). When measured purely in terms of insulation from presidential control, the CFPB's structure is at least as unconstitutional as the FHFA's. Viewed holistically, the CFPB is far worse: Unlike the FHFA, the CFPB has vast legislative, prosecutorial, and adjudicative power over a huge swath of the economy and over private citizens. AOB 40-41. The panel should hold that the CFPB is unconstitutionally structured.

**II. All American Is Entitled To Judgment.**

The en banc Court's decision in *Collins* further supports All American's argument that the proper remedy here is to grant judgment on the pleadings to

All American. The for-cause removal provision cannot be severed from the CFPA. In any event, severance only addresses the constitutional removal problem *going forward*. Here, All American has properly sought *retroactive* relief, and defendants who raise a structural constitutional violation as a defense to an enforcement action are entitled to judgment in their favor, *i.e.*, dismissal of the action—not just an abstract declaration of unconstitutionality. The Acting Director's attempts at ratification were fruitless, as the panel decision in *Collins*, which the en banc Court reinstated, makes clear.

**A. Judgment For All American Is The Proper Remedy.**

Although the en banc Court in *Collins* did not invalidate the Net Worth Sweep at issue in that case, despite the availability of independent statutory grounds for vacatur under the Administrative Procedure Act ("APA"), the Court still acknowledged that "in some instances" the actions of an unconstitutional officer who is "too distant from presidential oversight to satisfy the Constitution's requirements" "should be invalidated." 2019 WL 4233612, at *27. This is one of those instances.

**1. The For-Cause Removal Provision Cannot Be Severed.**

As an initial matter, Article III of the Constitution does not allow courts to "strike" a provision from a statute. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring) ("Early American courts did not have a severability doctrine" because "[t]hey recognized that the judicial power is, fundamentally, the power to render judgments in individual cases."). Rather, "when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them." *Id.* at 1486; *see also Collins*, 2019 WL 4233612, at *41 (Oldham, J., concurring in part and dissenting in part, joined by Ho, J.) (traditionally, Article III courts "decline to enforce" unconstitutional statutes and "enjoin their future enforcement"). Here, a proper remedy therefore would be to decline to enforce the CFPA against All American because the CFPA is unconstitutional, which is another way of saying that judgment should be entered in All American's favor.

In any event, severability turns on whether "the statute will function in a manner consistent with the intent of Congress," *Alaska Airlines v. Brock*, 480

U.S. 678, 685 (1987) (emphasis omitted), and whether it will result in legislation that Congress "would not have enacted," *Murphy*, 138 S. Ct. at 1482 (majority). As All American argued in its opening and reply briefs—AOB 62-65; Reply Br. 30-34—the for-cause removal provision of the CFPA cannot be severed. Rather, the CFPA must be held unconstitutional. In *Collins*, the en banc Court severed the for-cause removal provision from HERA, but this case differs from *Collins* in several important ways.

First, in *Collins*, the "plaintiffs concede[d] that this Court 'could reasonably follow the panel's approach to this issue and sever only the Director's for-cause removal protection.'" Supp. Br. of Treasury Dep't 43-44, *Collins v. Mnuchin*, No. 17-20364, 2019 WL 182735 (5th Cir. Jan. 2019). All American has made no such concession.

Second, the CFPB has far broader authority than the FHFA—with Congress consolidating enforcement authority over 19 federal statutes in the agency on the premise that it would be totally independent from the President. Congress wanted the CFPB to be completely independent of both the President and Congress, but combining that independence with the agency's broad authority was a package deal. Numerous legislators, including Representative Barney Frank and Senator Elizabeth Warren, have urged that severing the CFPA's removal provision is "at odds with Congress's design," would "undermine the CFPB's ability to fulfill its important role under Dodd-Frank," and would "fundamentally alter[] the CFPB and hamper[] its ability to function as Congress intended." Members of Cong. Supporting Reh'g En Banc Br. 2, 5, *PHH Corp. v. CFPB*, No. 15-1177, 2016 WL 6994388 (D.C. Cir. Nov. 29, 2016). As even the en banc *PHH* majority recognized, Congress sought to "insulat[e]" the CFPB "from political winds and presidential will," whereas severing the removal provision would "effectively turn[] the CFPB into an instrumentality of the President." *PHH Corp. v. CFPB*, 881 F.3d 75, 83, 110 (D.C. Cir. 2018) (en banc). Severing only the removal provision while leaving the CFPB independent from congressional appropriations and oversight—and thereby dramatically expanding presidential power at the expense of Congress—"would have seemed exactly backwards" to Congress. *Murphy*, 138 S. Ct. at 1483.

To be sure, some "574 pages before" the removability clause within "the mega Dodd-Frank legislation," there is a boilerplate severance clause; but it "says nothing specific about Title X, let alone the CFPB's independence, let alone for-cause removal, let alone the massive transfer of power inherent in deleting section 5491(c)(3), let alone whether the Congress would have endorsed that transfer of power even while subjecting the CFPB to the politics of Presidential control." *PHH*, 881 F.3d at 163 (Henderson, J, dissenting). While a severability clause creates a rebuttable "presumption" that Congress did not want the validity of an entire statute to depend on the constitutionality of each individual part, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968). All of the provisions that make the Director unaccountable are central to the CFPB's structure. Picking and choosing which ones to keep would not fix an existing agency, but create a new one. "[S]triking the removal provision[ ] would lead to a statute that Congress would probably have refused to adopt." *Bowsher v. Synar*, 478 U.S. 714, 734-36 (1986).

All American is thus entitled to judgment because the CFPA as a whole is unconstitutional.

**2. Judgment For All American Is The Proper Remedy Even If The Court Were To Sever The For-Cause Removal Provision.**

Even if severance were proper here—and it is not—judgment would still be the correct remedy. Whereas *Collins* involved an affirmative challenge brought under the APA by plaintiffs who, according to the Court, had sought inconsistent remedies, this case involves a defendant who has raised the CFPB's illegitimacy as a defense in an enforcement action. That is a crucial difference.

An unconstitutional federal agency "ha[s] no authority to bring [an] enforcement action." *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706 & n.2 (D.C. Cir. 1996); *see also NRA Political Victory Fund*, 6 F.3d at 822 ("[T]he Commission lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers."); *cf. SW Gen., Inc. v. NLRB*, 796 F.3d 67, 69 (D.C. Cir. 2015) (holding that the "complaint issued against the

[defendant] was unauthorized" because of Federal Vacancies Reform Act ("FVRA") violation and "vacat[ing] the [NLRB's] order"), *aff'd*, 137 S. Ct. 929 (2017). In the enforcement context, the proper remedy is for the court to "grant[] judgment for the defendant … by reversing the district court's judgment without remanding." *Legi-Tech*, 75 F.3d at 706 n.2.

Here, the judgment under review denies All American's motion for judgment on the pleadings on the basis that the CFPB is unconstitutional. But if All American is correct about the constitutional question, that determination must be *reversed*: There is "no theory that would permit [the Court] to declare [the CFPB's] structure unconstitutional without providing relief to the appellants in this case." *NRA Political Victory Fund*, 6 F.3d at 828. Otherwise, the court's opinion would be merely "advisory." *Teague v. Lane*, 489 U.S. 288, 315, 316 (1989) (plurality). As the district court recognized, if the CFPB is indeed unconstitutionally structured, "the case would not be able to proceed." ROA.7246. Judgment on the pleadings is the proper relief. *See* AOB 49-51; Reply Br. 25-26.

The Supreme Court has made clear that remedies for separation-of-powers violations must advance both the "structural purposes" of our Constitution and "create incentives" to bring such challenges in the first place. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (internal quotation marks and alterations omitted). But the CFPB's theory that the Court could just sever the removal restriction and the action against All American would simply proceed to trial cheapens the separation of powers and deprives successful separation-of-powers challengers of meaningful relief. What good is it for a party to prevail on a constitutional ground if doing so does not change the outcome of the court's judgment on the challenged action being reviewed? If unconstitutional agencies are permitted to avoid the award of any meaningful relief to the party at bar, no "rational litigant" will bring structural constitutional challenges going forward. Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014).

The en banc remedies majority in *Collins* did not invalidate the Net Worth Sweep, but the postures of *Collins* and this case are markedly different. In

*Collins*, the shareholders sought to invalidate only a limited component (the Net Worth Sweep) of a larger financing agreement. The Court observed that the shareholders did that "because," apart from the Net Worth Sweep, "the rest of the deal is a pretty good one for them." 2019 WL 4233612, at *26. But, as the Court concluded, "[t]hat is inconsistent with the usual course of remedies." *Id.* The shareholders were not "entitled to pick and choose a single provision to invalidate," keeping what was good for them while jettisoning what was not. *Id.* In essence, this Court held that the shareholders had sought inconsistent remedies. That, of course, bears no resemblance to the facts here. All American is not a plaintiff seeking to set aside a single contractual provision while upholding the rest of the contract, or trying to keep some benefit from an agency action while challenging the rest. Rather, All American is the defendant in an enforcement proceeding in federal court—where the remedy for a successful defense is judgment or dismissal of the action, which All American has consistently sought. *See* Fed. R. Civ. P. 12(b), (c).

### B. The CFPB's Ratification Arguments Remain Meritless In Light of *Collins*.

The Court's en banc opinion in *Collins* further demonstrates that the CFPB's argument—that a purported ratification by the temporary Acting Director of the CFPB, purportedly removable at will, sanitized this invalid action—is meritless, is foreclosed by *Collins*, and loses on its own terms.

#### 1. *Collins* Rejected The Premise Of The Same Ratification Argument The CFPB Makes Here.

The CFPB has argued that the Acting Director's presence solves the constitutional defects in the CFPB's structure, and that his purported ratification of the agency's decision to bring this enforcement action (ROA.7177-7183) cures the unconstitutional taint of that *ultra vires* action. This is wrong.

In *Collins*, the FHFA made a similar argument, contending that "the FHFA acting Director who adopted the Third Amendment was, unlike a normally appointed Director, not insulated from removal." 2019 WL 4233612, at *23. The en banc Court held that this did *not* change the agency's "central character" as "an independent agency." *Id.* (quoting 12 U.S.C. § 4511(a)). Thus, under

*Collins*, the Acting Director here was not independent of the President, and so no purported ratification could even be relevant. The purported ratification of the CFPB's Acting Director did "not cure the constitutional deficiencies with the CFPB's structure" because the "provisions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact." *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018). Like HERA, the Director's independence is unmistakably the CFPB's "central character." *Collins*, 2019 WL 4233612, at *23. It is "an *independent bureau*." 12 U.S.C. § 5491(a) (emphasis added). And the FVRA "shall not apply" to officers that "govern[] an *independent establishment*," including "*any* [B]oard, commission or similar entity." 5 U.S.C. § 3349c(1)(B) (emphases added). Whatever goes for the FHFA regarding the Acting Director's removability and the FVRA's applicability must apply equally to the CFPB. *See* Reply Br. 6-7.

The en banc majority criticized the dissent's view on ratification, which relied largely on *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996). As the majority explained, *Swan* interpreted a "holdover" statute in a different context that did not even contain a for-cause removal provision and thus "has limited value for generalizing a rule" to other situations. *Collins*, 2019 WL 4233612, at *23.

Finally, the Acting Director in fact was *not* subject to Presidential control. While the United States agreed that the CFPB was unconstitutional, the Acting Director refused to accede to that view of the Executive Branch and opposed it vigorously, in this case and others. *See* AOB 51-52 n.13. And just as All American predicted in its briefs, after the Acting Director's temporary tenure lapsed, a permanent Director was appointed and confirmed—whose office is unconstitutional by her own admission. Thus, the parties are back to square one. The attempted ratification was meaningless.

**2. The Purported Ratification Fails On Its Own Terms.**

The Acting Director's purported ratification cannot deprive All American of the remedy of judgment on the pleadings. AOB 48-66; Reply Br. 19-34.

*First*, "the constitutional issue raised" here "concerns the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." *RD Legal Funding*, 332 F. Supp. 3d at 785. The CFPB

cited Appointments Clause cases, CFPB Br. 16, but a defective appointment affects the validity not of the agency or the office itself, but of the particular officer. Here, All American challenges the authority of the CFPB as a body, both at the time this action was initiated and now. *See* AOB 55-56.

The acts of an unconstitutional body cannot later be ratified. "An unconstitutional act is not a law" and "is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886). "Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached." *Id.* at 449. Thus, a lawful entity "[can]not ratify the acts of an unauthorized body." *Id.* at 451; *see also Ringling v. City of Hempstead*, 193 F. 596, 601 (5th Cir. 1911); Reply Br. 23.

*Second*, even if this action could be ratified, the Acting Director's ratification was ineffective. AOB 54-61; Reply Br. 26-29. The purported ratification was null because the principal—an invalid agency—lacked the authority "to do the act ratified at the time the act was done." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (internal quotation marks omitted); *see also* Reply Br. 26-27.

*Third*, and critically, the CFPB also lacked authority to ratify at the time of the purported ratification on February 5, 2018 because, by that time, the CFPA's three-year statute of limitations had lapsed. *See* AOB 57-59; Reply Br. 27-29. The "ratification" came "too late in the day to be effective" and is therefore a nullity. *NRA Political Victory Fund*, 513 U.S. at 98.

* * *

This Court should declare the CFPB to be unconstitutionally structured, declare that the CFPA cannot be severed, and in all events grant All American judgment on the pleadings.

Sincerely,

*s/ Theodore B. Olson*
Theodore B. Olson

## CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2019, an electronic copy of the foregoing Supplemental Letter Brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on the following parties by the appellate CM/ECF system:

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